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THE PRESIDENCY SMALL CAUSE AMENDMENT ACT.

We have already on more than one occasion drawn attention to the unsatisfactory way in which bills are often drafted and passed by our legislative councils and one of the latest products of our legislative activity, *viz*, the Presidency Small Cause Court Act of 1895 furnishes confirmation of the truth of our remarks. The amendment of the Presidency Small Cause Court Act of 1893 has been under the consideration of the Government of India for the last few years, and though the new Act consists of only a few provisions, it does not seem to have derived that benefit which it might have been expected to obtain from the comparatively long process of incubation. The new Act introduces amendments of an important character as to the constitution, jurisdiction and the procedure of the Presidency Small Cause Court, and upon each of these matters, it seems open to criticism. In regard to the constitution of the court, the Act lays down certain qualifications for the appointment of Judge and Chief Judge. No objection can be taken to the provision that no person shall be appointed to be a judge of the Small Cause Court, unless he is an advocate, Vakil or Attorney of a High Court, or a judge of a Civil Court of not less than 5 years' standing. But there is absolutely no justification for the rule that not less than one-third of the persons, so appointed, including the Chief Judge, shall be advocates. Except in the predominance of the barrister element in the Vice-regal Council, we are unable to see any reason why a third of the appointments including the Chief Judgeship, should be declared to be a close preserve for advocates. If it is necessary that the representation of the advocate element on the bench should be secured by statute, it is equally necessary that the

representation of the other branches of the legal profession and the subordinate judicial service should be also secured by statute. As a matter of fact, there is no fear of the advocate element being neglected or insufficiently represented on the bench of the Small Cause Court, and there is no necessity for a legislative provision. Even if it be supposed to be necessary that a third of the judgeships should be reserved for the advocates, we can discover no reason for enacting that the Chief Judge should be an advocate. The functions of the Chief Judge are of two kinds, judicial and administrative. So far as the judicial functions go, they differ in no way from that of the puisne judges. As to the administrative functions, they are neither different in character from, nor heavier, than the functions which have to be discharged by judges and sub-judges in the mofussil. Can it be contended that while Vakils are competent for judgeships in the mofussil, for judgeships in the High Court and even for a temporary Chief Justiceship in the High Court, they are incompetent for the Chief Judgeship in the Small Cause Court? We have nowhere heard it stated what the unique functions of a Chief Judge of the Small Cause Court are, for which native Vakils or pleaders would be incompetent. And in the absence of any reason to the contrary we are compelled to come to the conclusion, that the provision is nothing but a result of the sway of class-influence. The provision of the new Act, in respect of acting appointments to the Chief Judgeship carries out the same invidious principle of class distinction and is even more objectionable. A pleader who has risen to the position of a High Court Judge may be permitted to act as a Chief Justice of the High Court, but if he has been appointed a Small Cause Judge, he connot hope to act for the Chief Judge. However well qualified he may be, a puisne judge of the Small Cause Court, if he happen to have been a pleader, will have to submit to the indignity of being superseded by an advocate judge who is junior to him.

The most important of the changes introduced by the new Act are those relating to the jurisdiction of the court. The opinion has been strongly entertained throughout the country that the investiture of the Small Cause Court with pecuniary jurisdiction up to 2,000 Rs. has not been beneficial in its results and that steps should be taken to provide some means of remedying any miscarriage of justice in suits above Rs. 1,000 in

value. Various remedies were suggested for the purpose, one being the deprivation of the Small Cause Court of all jurisdiction over suits exceeding Rs. 1,000 in value, and another being the concession of a right of appeal to the High Court in such cases. The latter course was open to the objection that it would induce a perfunctory performance of their ordinary small cause work by the judges, for the purpose of turning out a better quality of work in the class of appealable cases, as is sometimes the case in the mofussil. Speaking for the City of Madras, a strong argument in favour of the curtailment of jurisdiction is furnished by the fact that the number of cases between Rs.1,000 and Rs. 2,000 is only a little over 100 per annum, and that in the newly established City Civil Court there is a tribunal ready to hand to which these hundred odd cases may be conveniently transferred. The course adopted by the amending Act practically amounts to a curtailment of jurisdiction to Rs. 1,000. Though the jurisdiction of the Small Cause Court in suits above Rs. 1,000 is not taken away, it can be exercised only in cases in which both the parties agree in the trial of the suit by that court. It is open to a plaintiff in a suit above Rs. 1,000, to file his suit either in the High Court, or in the Small Cause Court. The penalty of forfeiture of costs imposed by S. 22 of the old Act on a plaintiff has been removed. If a plaintiff files his suit in the Small Cause Court for a sum exceeding Rs. 1,000, the defendant has got the right to apply to the High Court for a transfer of his case to the High Court, and the High Court is bound to grant the application, unless it is of opinion the application is made solely for the purpose of delay. The jurisdiction of the Small Cause Court in suits between Rs. 1,000 and 2,000 is thus practically a jurisdiction depending upon the consent of the parties and we see no objection to the exercise of such a jurisdiction. The provision however about the alternative forum in such cases is, so far as Madras is concerned, an inconvenient anomaly and seems to have been enacted in forgetfulness of the existence of the City Civil Court. Though the City Civil Court has jurisdiction up to Rs. 2500, the High Court will be bound to try suits of a Small Cause nature between Rs. 1,000 and Rs. 2,000 and cannot transfer them to the City Civil Court. Under S. 3 of the Madras City Civil Court Act of 1892 the City Court has no jurisdiction in suits or proceedings cognizable by the Small

Cause Court nor would S. 16 cl. (2) of the same Act empower the High Court to transfer such cases to the City Court. The work on the original side of the High Court is already congested, and the addition of a hundred odd suits per annum will largely swell the arrears. We hope that when the attention of the learned law member of the Vice-regal Council is drawn to this defect, steps will at once be taken to remedy it.

Where a suit has been removed to the High Court at the instance of the defendant, it is provided that the suit shall be heard and disposed of by such court in the exercise of its original jurisdiction, and that the High Court shall have all the same powers and jurisdiction in respect thereof, as if it had been originally instituted in such court. It is not clear from this provision whether a party aggrieved by the decision of the High Court in a suit thus transferred would have the right of appeal. Where a plaintiff files the suit in the High Court for an amount exceeding Rs. 1,000 he would clearly have the right of appeal. But where a suit instituted in the Small Cause Court is transferred to the High Court on the application of the defendant, it might be argued that it would still continue to be a small cause suit, and that there would be no appeal in such a case. We are inclined to think, that there would be a right of appeal under the letters patent, but we cannot help wishing that the matter had been expressly provided for.

Turning from the question of pecuniary jurisdiction to the other circumstances which confer jurisdiction, we find two amendments in S. 18 neither of which can be said to be happy. By the first amendment, a proviso is added to the section that where the cause of action has arisen wholly within the local limits of the jurisdiction of the court, and the court refuses to give leave for the institution of the suit, it shall record in writing its reasons for such refusal. The clumsiness of the amendment will be best perceived when it is read with clause (*a*) of S. 18 according to which if the cause of action has arisen wholly within the local limits of the jurisdiction of the Small Cause Court, and the court is inclined to grant leave to institute the suit, it must record its reasons in writing. The assumption in clause (*a*) of S. 18 is that leave should ordinarily be refused and exceptionally granted, while the assumption in the newly added proviso is that it should ordinarily be granted and only exceptionally refused. For our part, we find it difficult to

understand why the Small Cause suitor in the Presidency towns should be placed at a disadvantage as compared with his brother in the mofussil. While the latter has the unfettered option of instituting the suit either in the court, within the limits of whose jurisdiction the cause of action arises, or in the court within whose jurisdiction the defendant resides, the forum of the cause of action is available to the former, only at the pleasure of the Presidency Small Cause Court. The anomaly should be removed, and the suitor in the Presidency town placed on the same footing as the suitor in the mofussil. The other amendment in S. 18 enables a plaintiff at or before the first hearing of a suit in which a joint and several liability is alleged on a cause of action, arising either wholly or in part, within the local limits of the jurisdiction of the court to abandon the suit, as against any defendant who does not reside or carry on business or personally work for gain within such local limits, and to sue for a decree against such defendants only as do so reside, carry on business, or personally work for gain. The object of this amendment appears to be to mitigate the rigour of the rule that unless all the defendants reside within the jurisdiction, no suit can be entertained except with the leave of the court. The amendment, however, seems to be ill-conceived. In regard to cases of joint and several liability arising upon a contract, it is open to the obligee to bring successive suits against the obligors, until his claim is satisfied. In cases of this kind if a suit is brought against the obligors under the mistaken impression that they all reside within the jurisdiction, while as a matter of fact some do not, the obligee should be allowed to withdraw his suit as against the non-resident obligors and not be compelled to abandon his claim against them.

The new Act introduces a provision corresponding to S. 23 of the Provincial Small Cause Courts Act, but somewhat different in language. According to S. 23 of the Provincial Small Cause Courts Act, when the right of a plaintiff and the relief claimed by him in a Court of Small causes, depend upon the proof or disproof of a title to immoveable property or other title which such a court cannot finally determine, the court may return the plaint to be presented to a court, having jurisdiction to determine the title. Under S. 19 (*a*) of the new Act the Presidency Small Cause Court is empowered to return the plaint to be presented to the proper court, whenever it finds

that for want of jurisdiction, it cannot finally determine the question at issue in the suit. We do not understand what is meant by the words "the question at issue in the suit." There may be more than one question at issue in the suit and to which of these questions the want of jurisdiction is to be taken as referring is left in doubt. If the words are intended to refer to the substantive relief claimed by the plaintiff, there can be no want of jurisdiction. If on the other hand, they refer to any collateral issue on which the plaintiff's right to relief depends, the decision of the Small Cause Court will in no case be binding in any future suit not of a Small Cause nature in which the same issues may arise for determination. The language of S. 23 of the Provincial Small Cause Courts Act is no doubt not sufficiently wide. If for instance, a simple bond for Rs. 5,000 provides for annual payment of interest and a suit is brought for a year's interest in the Small Cause Court and want of consideration is pleaded by the defendant, the court would under the Act of 1882 be obliged to try the question of want of consideration, notwithstanding that its decision cannot bind the parties in a suit for the principal brought in the High Court. It is to obviate any inconvenience of this kind that the new clause S. 19 (*a*) seems to have been framed. But the wording cannot be commended as very felicitous and the very loose powers it gives to the court may be abused.

We shall only touch upon one more point in the new Act and that is the question of procedure in the court. Under S. 23 of the Act of 1882, certain portions of the Code of Civil Procedure specified in the schedule were declared to be applicable to the Small Cause Court, so far as the same might in the judgment of the court be so applicable. Power was given to the court, subject to the control of the local Government, to notify from time to time that any of the portions of the Civil Procedure Code specified in the schedule should not be applied to the Small Cause Court and to modify or cancel such notification. Under S. 9 the court might with the sanction of the High Court make rules to provide in such manner as it thought fit for all matters not specially provided for by the Act. Under the amending Act S. 23 has been repealed and S. 9 has been amended and the High Court is now invested with the power to prescribe the procedure to be followed and the practice to be observed by the Small Cause Court,

either in supersession of, or in addition to, existing rules. While the transfer of the power to make rules from the Small Cause Court to the High Court is salutary, the repeal of S. 23 is mischievous. The principle underlying S. 23 was a perfectly sound principle. While the main rules of procedure applicable to Small Cause Courts were considered by the Legislature and laid down beforehand in a schedule, care was taken to render it sufficiently flexible for the purposes of the Small Cause Court by leaving a power to the court to declare that any particular portions of the code specified in the schedule should not be applicable. We are not aware of any complaint that the provisions of S. 23 were not sufficiently elastic to meet the requirements of the Small Cause Court. The result of the total repeal of S. 23 would be that no portion of the Civil Procedure Code would be applicable to the Small Cause Court, unless the High Court chose to declare that particular portions should apply. The responsibility of framing a complete Code of Procedure is a burden which should not be placed on the High Court. The judges of the High Court cannot spare the necessary time for the work and it would not be wise to place upon them any large burden of delegated legislative functions.

MAXIMS OF EQUITY AND THEIR APPLICATION TO INDIAN LAW.

One of the most puzzling studies to the Indian student of law, is Equity Jurisprudence, and one of the most difficult feats that the practitioner in this country has to achieve is the correct application of the rules of English Equity Law to Indian questions. It is often said that in this country there is no difference between Law and Equity, and that it is therefore useless to vex ourselves with the two systems prevailing in England. While the former statement is in the main true, the latter is quite incorrect; the rules introduced by the English Courts of Equity have been largely imported into our law, and in order to understand and correctly apply in practice several of our statutory enactments, an accurate knowledge of English Equity law is absolutely necessary. We shall attempt to establish the soundness of this statement by illustrations. We may before doing so draw attention to one important branch of law where the difference between legal and

equitable estates, has been borrowed wholesale into our law. We refer to the law of Trusts. It will be remembered that Trusts were one of the earliest, as they have remained one of the most important, creations of the Courts of Equity in England. The beneficiary had no interest in the property, the subject of the trust, in the eye of the Courts of Common Law; the confidence reposed in the trustee did not form a ground of legal obligation enforceable by the courts. The Courts of Equity on the other hand enforced the duties which the trustees owed by accepting the confidence; but as the trustee still remained the owner at law (*i.e.* according to the Common Law Courts) the rights of the beneficiary were, and still are, often defeated by the trustee's breach of trust, that is in all cases where his rights conflict with those of persons dealing with the trustee *bona fide* without notice and for valuable consideration. Now in Indian Law also, in all cases of trust, the owner of the property is the trustee. A trust is defined as "*an obligation* annexed to the *ownership* of property arising out of a confidence reposed in and accepted by *the owner*, or declared and accepted by him for the benefit of another or of another and the owner." "The person who accepts the confidence is called the trustee." The person for whose benefit the confidence is accepted is called the beneficiary." (Trusts Act S. 2). So a trustee is not a mere agent or a manager but *the owner* of the property. His powers of dealing with the trust property, if he acts honestly and faithfully, may in many respects be less extensive than those of an agent or manager, but if he violates the confidence he has accepted, his powers are much larger than those of any agent, for he can effectually defeat the beneficiary's rights by keeping the person dealing with him quite ignorant of his real position. Whether our legislature was wise in transplainting bodily the English Trust law with the advantages and disadvantages of the particular legal history of England is not a question we have now to discuss; but it should be realized that in this department of law, we have in this country the two kinds of estates legal and equitable, though we have not two kinds of courts to enforce them. To be quite accurate, we must perhaps say, that the right *in rem* in all trust property is vested in the trustee; the beneficary has merely a right *in persomam* as against the trustee, and no interest in the property itself according to law. Hence his right is classed as an *actionable claim* (S. 131 Transfer

of Property Act) which is not a right *in rem*, *Rama Kristna* v. *Kurikal* I. L. R, 11 M, 445, *Modun Mohun Dut* v. *Futtarunnissa* I. L. R, 13 C, 297. But this is exactly the case with all "equitable rights" or rights recognised by the courts of equity; and in all essential respects, the position of a 'beneficiary' here is that of one owning an equitable estate in England. S. 437 of the Civil Procedure Code recognises this and enacts that "in all suits concerning property vested in a trustee, executor or administrator, when the contention is between persons beneficially interested in such property and a third person, the trustee, executor, or administrator, shall represent the persons so interested and it shall not ordinarily be necessary to make these parties to the suit, but the court may, if it thinks fit, order them or any of them to be made such parties." The last clause confers on beneficiaries a privilege not generally granted to one having only a right *in personam* and is enacted in view to the fact that in truth, though not in legal conception, the beneficiaries are the real owners of the property concerned. We may note that this section is in the same terms as the English rule on the subject see R, S C Order No. XVI 7, also Daniell's Chancery Practice vol. I. p. 195.

Another instance where the importation of English law of a somewhat similar character has created some difficulty may be noticed. It has reference to the nature of the right of a mortgagee. A mortgage is defined by Act IV of 1882 S. 58 as 'the transfer of an interest in inmoveable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an agreement which may give rise to a pecuniary liability. It will be observed that the transfer is not of the 'ownership' in the property but only of an *interest* in it; and it would appear clear that it was not the intention to reduce the mortgagor's right in the property to a mere right *in personam* as against the mortgagee to redeem, depriving it of the character of ownership and of a right *in rem* as in the case of the English law. It is however not easy to determine why the word *transfer* was used, and there has been considerable difference of judicial opinion on the question, see *Rangasami* v. *Muthu Kumarappa,* I. L. R. 10 M. 509 *Gopal Pandey* v. *Parsotam,* I. L. R. 5 A. 121 *Sheoratan* v. *Mahipal* I. L. R. 7 A. 258. *Khemji* v. *Rama* I.

L. R. 10 B. 519. When a mortgage is discharged or redeemed a *re-transfer* is directed, see Ss. 86 and 92. On the other hand it has been held that the mere payment of the debt extinguishes the mortgagee. What then is the necessity for a re-transfer, seeing that the legal estate has not been transferred to the mortgagee, and what would be the consequence supposing there were no express 're-transfer,? Has the mortgagee, notwithstanding the payment of his debt, an interest in the property capable of being transferred? If so, there would seem to be in this case something resembling legal and equitable estates. But we think this could hardly be the intention and the re-transfer, is probably intended only to protect third persons from being deceived into accepting a transfer of a mortgage which has been paid off. This intention, if we are right, ought to have been made clear, as the obscurity has already led to a great deal of confusion.

With the exception or exceptions just noticed, we may safely say that in India, there is no difference between legal and equitable estates, and that courts generally, recognise equally, what in England had to be dealt with in different jurisdictions before the Judicature Act. But as already observed, the rules of Equity are, notwithstanding, of great importance here, both to the scientific and practical lawyer. Owing to the nonexistence of the difference between the two kinds of estates, when the right over any property does not absolutely vest in one person or in the same body of persons, the law regards the ownership as cut up into fractions, each fraction resting in one or more individuals. All alike are legal rights, equally entitled to the protection of the court. Thus where a property is mortgaged, the legal right rests partly in the mortgagor and partly in the mortgagee. And if there are two mortgages one after another, the ownership is divided into three portions. So where there is a lease, the ownership is divided between the lessor and the lessee.

Let us now see how the rules of equity are made applicable to the Indian law. We shall, on this occasion take up two of these rules. (1) Where there are equal equities, the first in time shall prevail (2) Where there is equal equity the law must prevail.

We may premise that in considering the application of these rules to Indian Law, we might ordinarily translate an equitable right,

as a right *in personam* against the owner of certain property with reference to the property, as the right to get a lease or mortgage. For the sake of brevity, we may call these *imperfect* rights. A legal right may be translated as a completed or perfected right in the property, a right *in rem*, as where the lease, mortgage, &c., is completed by the due execution of a conveyance. It is also necessary to point out the distinction between an equitable right' and 'an equity.' An equity is merely a matter which forms a claim upon the consideration of a court of Equity, a reason for appealing to it for its protection, where the courts of common law fail to render justice. But the court of Equity did not grant relief in every case, though it might be right to do so; where it did interfere, the right which it conferred and which was not recognised in the common law courts was called 'an equitable right.' In many cases a man may have equity, but no equitable right; in the maxim 'where the equities are equal the first in time shall prevail', equity does not mean 'equitable right', but justice or rather such circumstances in one's conduct and position as are recognised by the court of equity as entitling him to its consideration.

The first maxim is a simple rule, and it requires but a few words to show that it is equally applicable here. It applies again to legal or perfect rights or to the conflict of rights *in rem* as much as to imperfect rights or *rights in personam*. With respect to *perfect* or *legal rights*, the substance of this maxim is embodied in S. 48 of the Transfer of Property Act. "Where a person purports to create by transfer at different times, rights in or over the same immoveable property, and such rights cannot all exist, or be exercised to their full extent together, each later created right shall in the absence of a special contract or reservation binding the earlier transfarees, be subject to the rights previously created." Where therefore there are three different mortgages, priority is determined between them by the order of time. An exception to this rule is illustrated by S. 78 of the Act which shows that where the owner of the prior right is guilty of some misconduct or negligence which induces the owner of the later right to believe that there is no prior right, the court will consider that the later claimant has stronger claims on its protection than the earlier and give him the preference, that is, the equities in the case are not equal. The section lays down "that when through the fraud,

misrepresentation or gross negligence of a prior mortgagee, another person has been induced to advance money on the security of the mortgaged property, the prior mortgagee shall be postponed to the subsequent mortgagee." In England the legal ownership being deemed to be in the first mortgagee, the second and third mortgagees' rights are only equitable. No similar rule is needed there with regard to common law rights, because the legal estate can be only in one. As already pointed out this maxim is not applicable where the equities are not equal. The rule means, where two or more persons, none of them having a claim enforcable in a common law court, have equal claims upon the consideration of the court of equity, it will support him whose claims are prior in point of time. To translate it into the language of Indian Law, we have only to substitute *imperfect rights* or *rights in personam* for *equities*; that is, where two or more persons have a right *in personam* as against a particular individual with regard to any property, but none of them has acquired a right *in rem*, the person who first obtained a right *in personam* is entitled to preference. Take the case where the owner of a house promises successively to sell or mortgage it to several persons; and all of them wish to have their promise carried out, and the sale or mortgage perfected; unless those who had the prior promise were guilty of any negligence or conduct which misled or deceived the subsequent promisee, the court will give preference to the prior promisees. In determining whether the equities are equal, it will be understood that the court will not judge from the standpoint of an abstract moralist; the practical question will be whether the person having the prior claim is guilty of any conduct *with reference to the subsequent claimant* which requires that his claim should be postponed.

"Where there is equal equity, the law must prevail." Briefly stated the rule means that where the claims to the protection of the court from the point of view of justice are equal, and one of the claimants has obtained also the legal estate in the property concerned, the latter must prevail over the former. In such a case priority of time is of no consequence. If the person having the subsequent claim, obtains also the legal right, he thereby acquires preference over the prior claimant. This may easily be expressed so as to embody a rule

of constant application in our law. Where, two or more persons are equally entitled from the point of view of those considerations of justice that influence the courts, but one of them, has obtained a right *in rem* over the property concerned by getting a conveyance or otherwise, and the others have only promises or rights *in personam* to have the property conveyed to them, the former's right must prevail over the rights of the latter. In England, one having a right *in personam*, entitling him to a right *in rem*, could not, formerly, by resort to the court, obtain the right *in rem*, but could only get compensation or damages as satisfaction for the violation of his right. But the court of equity has by introducing various remedies, such as specific performance *etc.*, made it possible for such a person to obtain the exact right *in rem* to which he is entitled. In India, where the courts have always possessed the powers, both of the Common Law and of the Equity courts of England, such specific remedies have always been open to a person entitled to a right *in rem*. And the claim to such remedy is no doubt regarded in the same light as any other legal right. But the principles on which such claims are enforced are very similar to those applying to the enforcement of equitable rights in England, that is, if there are two persons, one having a right *in personam* against an individual to be invested with a right *in rem*, and another has obtained the legal right from that individual and if the considerations of justice that appeal to the court are the same in favour of both, he that has perfected his right by obtaining the right *in rem* will be preferred to the other. The converse is equally important *viz.*, though one man may have obtained the right *in rem*, and the other has only a right *in personam* with reference to any particular property, if the former has less equity (*i.e.*, considerations of justice) than the latter, then, his right must be subordinted to the right ofthe latter, though it is legally less perfect. This rule is merely the application of the rule of equity, that a legal right will be subordinated to an equitable right if the equities of the claimant of the former are less than those of the latter. The most important practical application of this rule is in cases where an owner of property having first made a promise to sell, mortgage or to make any other kind of transfer to one person afterwards transfers to another. If the latter take the transfer without notice of the prior promise, the prior promisee and the

transferee are both blameless, or in other words, the equities of both are equal. But both cannot get the benefit of the transaction with the original owner equally. Who then is to suffer? According to the common law of England, the man who obtained the legal estate always had the upper hand, whatever his moral conduct might be, even if he joined with the owner in a scheme to defraud the prior promisee. The Court of Equity modified this rule, allowed the person who got the legal estate the preference where he was also blameless, but refused to do so where his equities were not equal to those of the first promisee. In the latter case the prior promisee was treated as if he had already obtained the legal estate as against the dishonest purchaser of the legal estate. In India also, the dishonest purchaser would have succeeded but for the importation of the rule of English Equity. The rule is enacted in S. 40 of the Transfer of Property Act as follows; "Where a third person is entitled to the benefit of an obligation arising out of contract and annexed to the ownership of immoveable property, but not amounting to an interest therein or easement thereon, such right or obligation may be enforced against a transferee with notice thereof or a gratuitous transferee of the property affected thereby, but not against a transferee for consideration and without notice of the right or obligation, nor against property in his hands." The positive part of this rule is somewhat wider than the rule of English equity, inasmuch as a gratuitous transferee who is without blame, is also subordinated to the holder of an earlier right in *personam* in connection with the property. The claims of a volunteer having a right *in rem* on the consideration of the court are thus regarded as inferior to those of a prior promisee for consideration even where the latter has not yet paid the consideration. On the other hand where the gratuitous transfer is prior to the promise for consideration, the promisee's rights are treated as inferior, for S. 24 (*d*) of the Specific Relief Act provides that specific performance of a contract cannot be enforced in favour of a person who previously to the contract had notice that a settlement of the subject matter thereof (though not founded on any valuable consideration) had been made and was then in force; here, though in one respect, the settlement has less equity, not being supported by valuable consideration, the promisee for consideration has less equity in another way as he has notice of the settlement.

The settlement on the other hand creates a right *in rem*, and even if it does not, it has priority in its favour "when the equities are equal, the first in time shall prevail." S. 25 clause (c) embodies the same rule as S. 24 clause (d). S. 27 clause (b) of the Specific Relief Act is in substance the same as the positive part of S. 48 of the Transfer of Property Act. It directs specific performance against "any other person claiming under him (*i.e.*, the contractor) by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract." S. 91 of the Trusts Act is also to the same effect raising a constructive trust in favour of the prior promisee when the subsequent promisee has obtained a conveyance. "When a person acquires property with notice that another has entered into an existing contract affecting that property of which specific performance could be enforced, the former must hold the property for the benefit of the latter to the extent necessary to give effect to the contract." So again rectification of instruments is permitted only "so far as this can be done without prejudice to rights acquired by third persons in good faith and for value." The rule, laid down in S. 64 clauses (a) and (b) of the Trusts Act, proceeds on the same principle. The trustee, being the legal owner, and the beneficiary having only a right in personam with reference to the trust property, a *bonâ fide* purchaser from the trustee is protected against the beneficiary's claims, for "when there is equal equity the law shall prevail." S. 64 enacts that the beneficiary's right in cases of breach of trust to follow the trust property or the proceeds thereof into the hands of third persons does not extend to property in the hands of (a) "a transferee in good faith for consideration without having notice of the trust, either when the purchase money was paid, or when the conveyance was executed or (*b*) a transferee for consideration from such transferee." We may state here that the provision in clause (b) would be equally applicable to purchasers from *bona fides* purchasers in other cases also. The test in every case where a later claimant has perfected his right by acquiring a conveyance is 'Are his equities equal to those of the prior claimant.' He may prove that his equities are equal, either by proving his own *bona fides* (as where a person purchases *bona fide* from a prior purchaser with notice) or the *bona fides* of the person from whom he purchased, for in either case the right *in*

rem cannot be postponed without injuring some one who has equal equity with the holder of the right *in personam*. S. 62 (a) of the Trusts Act protects "the right of lessees and others who, before the institution of a suit to have the property declared subject to the trust or retransferred, have contracted in good faith with the trustee or purchaser."

There are a few cases where one who has already a perfect legal right is deprived of it for the benefit of another who has subsequently also obtained a perfect right, notwithstanding that the former is not blameworthy in any way, and cannot be held to have misled the later claimant. These cases are dealt with in Ss. 38 and 39 of the Transfer of Property Act. Under the law or by virtue of a contract, a person is sometimes invested with the power of dealing with property so as to affect the rights of others owning (or interested in) the property under certain circumstances. Thus the manager of a Hindu family may mortgage or sell the family property to discharge debts binding on the family or for other necessary purposes. So an executor or administrator may alienate the property in his charge under certain circumstances; an agent for sale is empowered to sell under certain circumstances. In all these cases, persons dealing with the manager, executor or agent *bona fide* and in the belief that the circumstances justifying the dealing by him with the property exist in the particular case, are protected, and the rights they acquire are binding on the family, the estate, or the principal, notwithstanding that in reality the justifying circumstances are absent. On what principle is this rule based? The maxim "when the equities are equal, the law shall prevail" is inapplicable in this case, for the rights of the other members of family, the legatees, and the principal, are legal or perfect rights. The rationale of the rule is that in the interests of the family or the legatees or the principal themselves, such a principle should be adopted, for if transactions, honestly entered into, can be afterwards set aside at their instance on the ground that the manager or executor or agent did not act properly and prudently in the case, no one would deal with persons, having such qualified powers of disposal, and the estate or business would suffer. In the case of the agent, the rule may also be supported on the ground that the exigencies of

trade require it. Section 39 relates to cases where property over which one has a right of maintenance is transferred by the owner to one who accepts the transfer *bona fide* and without notice of the right to maintenance; the person, entitled to maintenance cannot in such cases enforce it against the transferee. Now the right to maintenance out of the property is not a mere imperfect right or right *in personam* but of the nature of a right *in rem*. It is called a *real* right in *Ramanadan* v. *Rangammal*, I. L. R., 12 M, p. 260, for while it is an interest in the property subject to maintenance in one sense, it is only a right to receive a portion of the profits thereof to a limited extent, not an interest in the corpus. If the maintenance were charged on the property in the hands of *bona fide* transferees, the result would be that a large extent of property would often be tied up for a small claim which could be satisfied out of a portion of the property. Moreover the existence of persons, entitled to maintenance, is not a fact easy to discover nor would it be easy to ascertain whether the claims have been otherwise provided for. Moreover, such persons could easily render their rights more perfect by getting them charged on specific property, and it would be injurious to the community, practically to restrain the alienation of the whole property, out of which they are entitled to maintenance. We cannot, however, stay to analyse fully the juristic basis of such exceptional rules. We have referred to them mainly to show that they are not founded on the rules of equity that we have been examining. We hope the illustrations, already given, would be sufficient to show what a large part the rules of English equity jurisprudence play in our law. Wherever a conflict arises between persons holding perfect and imperfect rights, or between persons all of whom have imperfect rights, in respect to property, a careful study of the rules applied by the courts of equity will supply the key to the correct solution of the problem. We shall on future occasions try to illustrate the applicability of other maxims of equity to Indian Law.

CRITICAL NOTES.

Mallikarjuna Prasada Naidu v. *Durga Prasada Naidu* I. L. R. 17 M, 362. *Claim to arrears of maintenance.* The decision in this case is one of considerable importance. The Court considered the

question as to whether in the case of an impartible zemindary the brother of the zemindar was entitled to arrears of maintenance prior to the date of suit. The decisions of the Privy Council in *Muttusami* v. *Venkateswara* 12 M. I. A. 203 and *Katchekaleyana* v. *Katche Vijaya* 12 M. I. A. 495 have settled the right of such a brother to claim maintenance. Notwithstanding the fact that the plaintiff had obtained a share in partible property in a suit for partition, the Court held him entitled to claim maintenance as he was undivided with the zemindar in respect of the impartible estate. But was he entitled to arrears? From the date on which he instituted the suit for partition of the zemindary, which was finally decided against him by the Privy Council, or in fact from the date from which he was excluded from participation in the income of the impartible estate he claimed to be entitled to recover arrears of maintenance. But the learned judges, *Collins C. J. & Shephard J.* decided against him as regards the arrears except with reference to a short period during the pendency of the appeal in the Privy Council when, under the order of the High Court, the plaintiff was in receipt of an allowance in lieu of maintenance. Their Lordships observed, "The circumstance that a person entitled to maintenance has not in fact been maintained by the person chargeable does not necessarily give him a right of action for arrears. It is incumbent on him to prove that there has been a wrongful withholding of the maintenance to which he is entitled" There is a singular want of authority on the question decided by the learned judges. There is no doubt that the plaintiff, the brother of the zemindar, is entitled to separate maintenance from the time he chooses to live apart, if he then claims it. The balance of authority is in favour of the recognition of such a right even in the case of a widow of a coparcener (Mayne S. 415). On the other hand there can equally be no doubt that if he lives under circumstances in which there is no reason to suppose that he is likely to claim any support out of the family income, he is not entitled at the end of a period of separate residence to claim arrears. As their Lordships observe, "It could not be Hindu law that the manager of the family should, at the choice of any member preferring to reserve his claim for maintenance out of current income be compelled to pay from time to time sums of accumulated arrears which could only be paid out of capital." But there is an intermediate class of cases falling between the two we have just men-

tioned in which it is difficult to determine the validity of a claim for arrears. Demand and refusal are not a condition precedent to the validity of a claim for arrears *Jivi* v. *Ramji* I. L. R., 3 B. 207, and *Mahalakshmamma* v. *Venkataratnamma* I. L. R., 6 M. 83). The right of the coparcener to maintenance always exists. If he chooses to live in the family, he is entitled to be maintained in it. If he lives away from the family and wants to be maintained out of the family income, he is entitled to separate maintenance, unless there is a waiver on his part of his claim to separate maintenance or the circumstances indicate that he has no intention of claiming any support out of the family income. It seems to us to be wrongful withholding of the maintenance not to pay it to him. We concede that if he simply lives away from the family house for a number of years relying upon his own resources and not claming to draw his support from the family estate, it is not fair to the manager to allow him to claim arrears of maintenance after the lapse of that period. If on the other hand, as in the case under consideration he takes up his residence separately and sues his brother for partition with varying success, conducting his litigation out of borrowed funds, the intention to claim maintenance after the failure of the partition suit for the period during which he has been so living apart is perfectly clear, and the injustice lies in refusing to him arrears of maintenance, merely because he could not concurrently prosecute a claim for arrears of maintenance with a claim for partition of the estate. Can it be said that the zemindar had no notice that the plaintiff would claim the maintenance? Their Lordships observe, "In my opinion it isclearly the plaintiff's own fault that he has not received maintenance for the whole period of 12 years for which he claims it. In a suit brought in 1880, he made another and inconsistent claim, and therefore he has no right, now that he has failed in that litigation, to complain that a claim not made by him though conceded by the defendant was not satisfied. There had been no wrongful withholding on the part of the defendant." Now what is wrongful withholding? It is the infraction of the right to separate maintenance. No demand was necessary for the perfection of the right. No claim by the plaintiff was necessary for the accrual of the cause of action. If he lived separately he might at once sue for the maintenance, at the time when such separate residence commenced. How does he lose the right

of action, merely because he has allowed some time to elapse after the separate residence began, unless he is barred by the statute of limitations or waives his claim for maintenance? It may be said that he maintained himself out of other property. But that does not extinguish his right to maintenance out of the family income. Apart from authority, we feel inclined to think there is a wrongful withholding of the maintenance when the coparcener lives away and no maintenance is paid to him, if either expressly or by implication he does not dispense with it. If a person has been excluded from participation in the profits of the family estate to his knowledge, as in this case, it cannot be said that there has been no wrongful withholding of the maintenance due to him.

Now how does the matter stand upon the authorities? As observed by *West J.* in *Rango Vinayak Deo and others* v. *Yamuna Bhai* I. L. R, 3 B 44, the courts seem to have exercised a discretion as to awarding or refusing arrears. In *Jadumani Dossee* v. *Khettramohun Shil*, at p. 366 of the Vyavastha-Darpana, the Supreme Court of Calcutta awarded arrears of maintenance from the date of demand. In *Ahalya Bhai* v. *Luckee Monee Debia* 6 W. R., 36, the court simply refused arrears, because there was no demand by the widow for maintenance till she brought the suit. In *Venkopadhyaya* v. *Kaveri Hengusu* 2 M, H. C. R., 36, the High Court of Madras held the widow entitled to arrears of maintenance irrespective of any demand. If the law confers on the widow the right to sue for maintenance at any time and she does not sue for it then, but claims it as arrears afterwards, *Phillips & Holloway, J. J.*, observe "the only bar to the enforcement of a purely legal right is lapse of the time required by the statute of limitations to bar the remedy." This decision has been quoted with approval by the Privy Council in the case in 12, B. L. R., P. C., 238, *Raja Prithi Singh* v. *Rani Raj Koer* in which their Lordships awarded arrears of maintenance, though there is nothing to show in the report the exact circumstances under which maintenance had not been paid. In *Narayana Rao Ramachandra Pant* v. *Ramabhai*, I. L. R, 3 B, 415, their Lordships of the Privy Council observe, "It was then said that no action could be maintained because demand and refusal had not been proved. There was no evidence of specific demand for maintenance. But the Subordinate Judge

has found and the High Court have not disagreed with him that the maintenance was refused, and taking all the circumstances of this family into consideration, their Lordships do not doubt that there was a withholding of this maintenance by the son under circumstances which would amount to a refusal of it." We do not take the language of their Lordships' judgment to imply any thing more than that to justify a claim for arrears of maintenance, there should be non-payment under circumstances in which there is no reason to believe that the member would not require such support. In *Mahalakshmamma* v. *Venkataratnamma* I. L. R., 6 M, 83, *Muthusami Iyer & Tarrant JJ.*, observed in answer to a contention against arrears being allowed, "It is found as a fact that the respondents lived separately during the period for which arrears are claimed and that the appellants made no payment for her support. No previous express demand is necessary to sustain a claim to past maintenance and it is only evidence of a wrongful withholding of maintenance which is the ground of liability." There were actual demands in the case and these observations were therefore in the nature of *obiter dicta*; and the words "wrongful withholding" mean to us nothing more than non-payment under circumstances which do not absolve the manager from liability. There is no hint in the judgment as to what the circumstances are which would release the manager from the liability. Living away for immoral purposes would be one of them. And living away, accompanied by waiver of any claim for support out of the family funds, would be another. There is one other case to which reference should be made, and that is the decision in *Jivi* v. *Ramji*, I. L. R., 3 B, 207. *Melville & Kemball, JJ.* simply decide that demand and refusal do not constitute the cause of action and quote with approval the decisions in *Venkopadhyaya* v. *Kaveri Hengusu*, 2 M, H. C. R., 36 and *Raja Prithi Singh* v. *Rani Raj Koer* 12 B. L. R., P. C., 238.

This review of the authorities does not seem to us to support the position taken in the judgment of *Collins C. J., & Shephard J.* Their Lordships' judgment goes so far as to deny any claim to arrears of maintenance during the period commencing from the date of the judgment of the Privy Council in the partition suit and ending with the date of the institution of the suit for maintenance. The plaintiff had been living away during all that time and

had claimed and received by order of court an allowance in lieu of maintenance in the partition suit itself up to the date of the decree of the Privy Council. Unless demand and refusal were a condition precedent, which it has been held they are not, to a valid claim for maintenance, it would be difficult to reconcile ourselves to the judgment of the High Court refusing the maintenance for the period between the Privy Council judgment and the suit for maintenance.

NOTES OF INDIAN CASES.

Ponnambala Thambiran *v.* Sivagnana Desika Gnanasambandha Pandara Sannidhi, I. L. R., 17 M 343. There are some sections in the Code of Civil Procedure on which light is always welcome and S. 244 is one of them. But the decision of the Privy Council in this case cannot be said to have added to it. In a suit for the recovery of a *mutt*, a decree is passed ordering the removal of the defendant and directing the plaintiff to nominate a man to the *mutt* who was to be appointed by the court, if found fit. The plaintiff nominated one and died. The plaintiff's successor withdrew the first nomination and nominated another. The Sub-Judge held there was no power to withdraw the first nomination, found the first nominee fit and appointed him. The plaintiff's successor appealed and the High Court agreed with him and reversed the Sub-Judge's order. The first nominee now appealed to the Privy Council and the respondent objected that there was no right of appeal. The Privy Council rightly hold that he was entitled to appeal, as otherwise he was without remedy. S. 244 had nothing to do with the right of appeal to the Privy Council, for an appeal to the Privy Council is allowed from a final decree, which includes a judgment or order. The order of the High Court from which the appeal to the Privy Council was preferred need not have been a decree within the meaning of S. 2. If the first nominee was a party to the proceeding in the High Court, not necessarily a party to the original suit or appeal, he was entitled to seek his remedy at the hands of the Privy Council by means of an appeal. But we are unable to see how the nominee of the decree-holder could be treated as a party to the original suit or appeal.

Madhava Row *v.* F. M. Fernandez, I.L.R. 17 M, 368. This decision lays down an important principle. An encroachment by a defendant on a government channel caused the plaintiff's lands to be flooded. The lear-

-ned judges hold that the fact that there was a prior encroachment by the plaintiff but for which the flooding would not have taken place, did not disentitle him to relief against the defendant. The decision of the House of Lords in *Radley* v. *L. & N. W. R*, Co, 1 A. C. at 759 which lays down the qualification of the rule as to contributory negligence "that, though the plantiff may have been guilty of negligence and although that negligence may have in fact contributed to the accident, yet if the defendant could in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him," enunciates a principle which is equally applicable to this case. The proximate cause of the flooding was the defendant's encroachment which could have been prevented with ordinary care. The plaintiff's prior encroachment therefore did not stand in the way of his recovering damages.

Rahamtullah Sahib *v.* **Rama Row**, I. L. R. 17, M. 337. What is the interest that is sufficient to entitle a person to object, to the grant of probate of a will? His being a simple creditor of the estate will not do. His being a legatee under the will sought to be impugned will not entitle him to oppose it, for unless he claims against the will he has no interest in opposing it. If there was a prior genuine will under which he claimed, he might prove that interest in the proceeding in which probate is asked for of the later will.

Venkata rayer *v.* **Jamboo Ayyan** I. L. R. 17 M. 377. To what Court does an appeal lie from the order of a Sub-Judge passed in insolvency matters? *Muthuswami Iyer & Parker J.J.* answer, to the District Court or the High Court, according as the appeal lies from the decree in the suit. Does this give effect to the words of the proviso to S. 589 introduced by Act X of 1888 "that the appeal shall lie to the District Court where the order was passed by a Court Subordinate to that Court"? We think not. If their Lordships are right, there is no reason why there should be a proviso. The same result would flow from the section itself, without the proviso. But their Lordships say the proviso was necessary for insolvency orders by Small Cause Courts. If so, instead of using language much too wide, the legislature should have simply said "to the District Court where the order was passed by a Small Cause Court" Moreover the provision about an order of the Small Cause Court would not be in the nature of a proviso to the first part of the section. It seems to us that notwithstanding the anomaly adverted to by the learned Judges, the plain language of the section is against their interpretation.

Shankar Prasad *v.* **Jalpa Prasad.** I. L. R., 16 A, 371. There is no doubt that the ordinary rule is that when a person is entitled to enforce a claim, limitation runs against him from the time at which he is entitled to sue. At the same time, the rule is admittedly not without exceptions as in the cases of suits for partition, maintenance &c. *Prima facie* one is inclined to think that the cases of instalment bonds or decrees which contain a provision that in default of payment of any one instalment, the plaintiff is entitled to recover the whole amount at once should fall within the exception. The remarks will apply to a number of other cases. This would be beneficial to the debtor and cannot injuriously affect the creditor. But the current of decisions has been the other way. In *Hemp* v. *Garland* 4 Q B, 519, it was held that if a bill be made payable by instalments with a provision that if one instalment fail, the whole sum shall thereupon become due, the statute will commence to run from the date of such default, and this was followed in *Reeves v. Butcher*, 1891 II, Q B. 509. Banning in his work on Limitation observes. "It may be noticed however that it might be urged that this is at variance with the well known rule that no one is obliged to take advantage of a forfeiture, a point which does not appear to have been in the argument." In India, this rule is expressly made applicable to suits on promisary notes. Art 75 of the Limitation Act column 3 provides that when default has been made in the payment of instalments, limitation begins "when the 1st default is made, unless when the payee or obligee waives the benefit of the provision, and then when fresh default is made in respect of which there is no such waiver." Now will the rule apply where it is not enacted? To our minds, the real intention of the parties in such cases appears to be to create an alternative right with the option of exercising either of them, and if this be correct, limitation would not run from the date of the 1st default, notwithstanding the absence of any waiver. But the decisions on this point are conflicting. See *Koylas* v. *Boykoonta* I. L. R, 3 C, 619, *Navalmal* v. *Dhondiba* 11 B, H. C. R, 155, *Ball* v. *Stowell* I. L. R. 2 A, 322, *Narain* v. *Gouri* I. L. R., 5 C, 21. There has been a similar conflict with regard to applications for execution of decrees when payment is directed by instalments with a condition entitling the decree-holder to execute for the whole amount of the instalments which are not paid. There is no provision with regard to execution similar to Article 75, but clause 6 in column 3 of article 179 fixesas the starting point of limitation "when the application is to enforce any payment which the decree or order directs to be made at a *certain date*, such date." When the decree holder is *entitled* to enforce payment of the whole, if there is default in the payment of instalments, is the payment directed on a certain date? If the view be correct that on

the proper construction of such clause, an alternative right is conferred, then it is clear that the payment is to be made on a *certain date*, for payment is to be made in one of two ways according to the choice. This view was adopted in *Ram Culpo* v. *Ram Chunder Shome* I. L. R., 14 C 352 and in the case under notice *Edge C. J* and *Blair J.* hold that the decree holder should not be compelled to execute for the whole, except when the terms of the decree clearly provide that if the instalments are not regularly paid, the decree holder shall execute for the whole. We cannot but think that this is the sound view, notwithstanding the large mass of authorities to the contrary which are all referred to in the judgment of the learned judges. We may note that in some of the earlier cases as in *Mon Mohun Roy* v. *Durga Churn* the weakness of the contrary position was perceived, but uniformity was preferred to soundness.

Lachmi Narain *v.* **Jethu Mal** I. L. R, 16 A, 386. There can be no doubt that a mortgagee is entitled to sue for trespass to the property mortgaged, whether the trespass constitues an ouster from possession or not But this rule does not apply as between joint owners. In these cases ouster is required. Opening a door in a party wall was held in the case under consideration to be a trespass destructive to the subject matter of the tenancy in common and an act of ouster, and a mortgagee may therefore institute a suit against the holder of the adjoining tenement for the injury.

Hira Lal *v.* **Ghasitu,** I. L. R., 16 A, 318. Where a usufructuary mortgagee leases the mortgaged premises to the mortgagor for a term and on the expiry of the term the latter refuses to surrender possession, the former acquires an immediate right to sue for the mortgage money under S. 68 clauses (*b*) and (*c*) of the Transfer of Property Act. So far the decision is thoroughly acceptable, but we are not prepared to follow *Sir John Edge, C.J.*, when he says that the mortgagee is not entitled to a decree for sale, but only to a money-decree. The learned judge states his opinion without any discussion of the point. That a mortgagor should by his own wrong be enabled to deprive the mortgagee of the benefit of his security appears to be unreasonable and unjust, and as expressed by *Lindley, L.J.*, in *In re Holford, Holford* v. *Holford*, 1894, III Ch. 30 when one is sought to be driven to a conclusion which appears unreasonable and unjust, one suspects at once the validity of the premises, even if no flaw can be detected in the reasoning. There have been two decisions in Madras, one in support of the Allahabad view, and the other against it. *Linga Reddi* v. *Sama Row*, 4 M. L. J., 143, is the later one and holds that the mortgagee would be entitled to a charge

for his money and bring the property to sale. In *Samayya* v. *Nagalingam*, I. L. R., 15 M, 174 at p. 178 the court held that the mortgagee would not be entitled to a charge or to an order for sale. Section 68 provides that the mortgagee has a right to sue for the mortgage-money in the cases specified only. The first case specified is where the mortgagor binds himself to repay the same. In this case at any rate it is clear that the mortgagee would be entitled to sale. It is natural to infer that in the two cases next specified also, *viz.*, where the mortgagee is deprived of the whole or part of his security by or in consequence of the wrongful act or default of the mortgagor, or where the mortgagee being entitled to possession of the property, the mortgagor fails to deliver the same to him or to secure the possession thereof without disturbance, the mortgagee was intended to have a right to sale. Where the security has been destroyed, it is of course impossible to proceed against it. But take the case in which the security has been rendered insufficient which is referred to in the last clause of S, 68. If the mortgagor fails to furnish additional or sufficient security for the debt, the mortgagee can sue for the money. It would be preposterous to contend that the very insufficiency of security which gives a cause of action should be deemed to be a reason for depriving the mortgagee of even the insufficient security that is left to him. The only reasonable construction to place on the section is that the right of the mortgagee to sue for the money constitutes a charge on the property. Let us now turn to S. 67 which provides that the mortgagee has at any time after the mortgage-money has become payable to him, a right to sale or foreclosure. The words "after the mortgage money has become payable to him" are sufficiently wide to include the case in which the money has become payable under the contract, as well as the case in which it has become payable by law, and S. 67 therefore embraces all the cases covered by S. 68. It is said in *Samayya* v. *Nagalingam*, that Ss. 67 and 68 deal with three kinds of rights of mortgagees, *viz.*, foreclosure, sale and suit for the money due, S. 67 being concerned with the two first and S. 68 with the last. We cannot accept this classification of the remedies of the mortgagee as correct. Unless the classification implies that they are independent reliefs, there is no force in the argument. Both foreclosure and sale appear to us to necessarily imply a right to recover money. The forms of decrees for foreclosure and sale (Ss. 86, 88 and 89) include an order for payment of the money in the first instance. If a right to recover money always implied a right to proceed against the mortgagor personally, it might be said that a right to sale or foreclosure did not imply a right to recover money. But it is clear that the right to sue for money as given by S. 68 does not always carry with it a right

to proceed against the mortgagor personally. Take the case in which there is an express covenant to pay. If the mortgagee brought his suit after six years from the date of the cause of action, he could have no personal remedy. Section 67 seems to us to presuppose a suit for money due and include all the cases dealt with in S. 68.

NOTES OF ENGLISH CASES.

Hamilton *v.* **Ritchie,** 1894, A. C., 310. Where a lay testator who writes his own will uses words which have an intelligible conventional meaning, he is not to be held as having used the words with any other meaning unless the context of the instrument shows that he intended to do so.

Where a will gives an unqualified bequest of land, making no reference to the time at which it is to operate, the gift takes effect *a morte testoris*, except where that date would disturb any of the provisions already made in the will, or where the testator has clearly indicated that he did not intend it to operate until a later period.

Palmer *v.* **Wick and Pulteney Town Steam Shipping Co.,** 1894, A. C., 318. A joint and several decree was passed against two defendants for damages for negligence and costs. One of them paid both demands and took an assignment of the decree. He sued the other for his moiety. *Held* that the latter was liable, as the claim rested on a decree which created a civil debt.

Per Lord Herschell and *Lord Watson*; *Merryweather* v. *Nixon* is not founded on any principle of justice, or equity or even of public policy which justifies its extension to the jurisprudence of other countries.

Per Lord Halsbury. In England the transmutation of the cause of action into a judgment would not prevent the application of the principle of *Merryweather* v. *Nixon*.

Leslie *v.* **Young and Sons.** 1894, A. C., 335. The mere publication in any particular order of the Time Tables issued by Railway Companies cannot be claimed as a subject matter of copyright, if no more has been done than to copy them in their order leaving out such stations as the author thinks fit.

Per Lord Herschell. "Though there may be copyright in a compilation or abstract involving independent labour, yet in such a subject matter as that with which we are dealing it ought to be clearly establish-

ed that looking at these tables as a whole, there has been a substantial appropriation by the one party of the independent labour of the other, before any proceeding on the ground of copyright can be justified." *Held* also that abridged information of train service in connection with circular tours of a particular locality may be the subject matter of copyright.

Hemlett *v.* Allen, 1894, A. C., 383. A payment made by an employer at the instance of a person employed by discharging some obligation of the person employed or by placing the money in the hands of some person in whose hands the person employed desires it to be placed is a payment to the person employed within the meaning of 1 and 2 William IV ch 37 as much as if the current coin of the realm had been placed in his or her hands.

Cobb *v.* Great Western Railway Company, 1894, A. C, 419. In an action by a plaintiff, a passenger in a train of the defendant company who was robbed by a gang of men that entered the carriage where he was seated and who alleged that his complaint to the station master of the robbery and his request to stop the train to enable a search by the police were unheeded and that the defendant company was negligent in permitting the carriage to be over-crowded which facilitated the robbery, *Held* that the statement of claim disclosed no cause of action against the defendent.

Mohamidu Mohideen Hadjiar *v.* Pitchey, 1894, A. C, 437. A creditor of a deceased debtor cannot sue a person named as executor in the will of the deceased, unless he has either administered or obtained a grant of probate, and a sale in execution of a judgment obtained against such person does not bind the deceased's estate. *Held* also that an order for probate without an actual grant thereof does not prove the will and that an application for probate does not show an executor's acceptance of its trusts.

Letters of administration even if irregularly granted are valid till revoked.

Royal Bank of Scotland *v.* Tottenham, 1894, II, Q B, 715. A post-dated cheque stamped as a cheque, is admissible in evidence in an action brought, after the date of the cheque, by the holder, since, under he Stamp Act 1891, the test of the admissibility is whether the instrument appears when tendered in evidence to be sufficiently stamped.

Kennedy *v.* Thomas, 1894, II, Q. B., 759. By the Bills of Exchange Act 1882 S. 14 Sub-S 1 a bill of exchange is due and payable on the

last day of grace: *Held* that when payment of a bill of exchange is refused by the acceptor at any time on the last day of grace, the holder though he is entitled at once to give notice of dishonour to the drawer and the indorsee, has no cause of action against either the acceptor or the other parties to the bill until the expiration of that day

An action brought by the holder against the acceptor on the last day of grace must be dismissed as premature.

The Queen *v.* **Silverlock**, 1894 II, Q. B., 766. Held that a count in an indictment for obtaining a cheque by false pretence which averred that the false pretence was made in a fraudulent advertisement in a newspaper to the subjects of Her Majesty the Queen was good, although it did not allege that the false pretence was made to a particular person.

Lemmon *v*, **Webb**, 1894 III Ch. 1: Large boughs of defendant's trees overhung plaintiff's premises for over 20 years. Defendant without going on plaintiff's land and without notice to him lopped off the branches up to his boundary line; plaintiff sued for a declaration that defendant was not entitled to cut any branches which had continued for over 20 years and that under any circumstances he ought to have had notice. Held, reversing the decision of *Kekewich J*, that no prescriptive right was acquired by the plaintiff, that no notice was required as there was no entry upon the land of the plaintiff and that there was no trespass;

Per Lindley L. J.:—The owner of a tree has no right to prevent a person lawfully in possession of land over which its branches grow from cutting away so much of them as projects over his lands and the owner of the tree is not entitled to notice, unless his land is entered in order to effect such cutting; however old the branches may be, they may be cut without notice, subject to the same condition. The right of an owner or occupier of land to free it from such obstructions is not restricted by the necessity of giving notice, so long as he confines himself and his operations to his own land, including the space vertically above and below his surface" This decision has since been affirmed by the House of Lords.

Drew *v.* **Guy,** 1894, II Ch. 25. In a contract entered into between plaintiff and defendant by which the defendant agreed not to carry on "similar business," the meaning of the expression "similar business' explained. "Similarity" is not to be inferred or negatived from the fact that the same quality of the article is sold or not, nor from the similar

appearance or otherwise of the two business premises: The question will be whether the defendant's business is so like that of the plaintiff's as seriously to compete with it.

In re **Holford**. **Holford** *v.* **Holford,** 1894, III Ch. 30. A testator directed that his property should be divided equally among such of the children of A as may be alive at the time of his death and that their shares should be given to them only on their attaining their 21st year. No provision was made for the maintenance of the children till they attained their 21st year. The income consequently accumulated and the plaintiff the eldest of the 6 children of A claimed on her attaining the 21st year her ⅙th share of the property and also the whole of the accumulated income which she contended became payable to the first legatee who attained the 21st year. Held that he was entitled only to ⅙th of the whole.

Corporation of Bradford *v.* **Pickles,** 1894, III Ch. 53. The plaintiffs became owners under an Act of Parliament of waterworks with power to work the springs for their exclusive benefit. The Act also prohibited all persons from diverting, altering or appropriating "in any other manner than by law they may be legally entitled" any of the waters supplying the plaintiffs' spring: Defendant upon his own land proposed to construct an underground drift or tunnel, the effect of which would be to diminish the water supply of the plaintiff's springs. It was found that the object of the defendant was not to benefit himself so much, as to injure the plaintiffs.

Held on the question of malice, that under the English law the question of malice has no bearing upon the strict legal rights of the parties, although under the civil law and the Scotch law an act which is lawful in itself will be regarded as illegal, if done with a malicious intent of injuring a neighbour.

Held on the question of defendant's right to quarry stones upon his own land, that even though there may be no provision in the Act of Parliament to compensate persons for any injury done to them by reason of the provision of that Act, still if the language of the Act was that, effect must be given to it irrespective of the consideration whether injustice will be done to others or not.

T. *v.* **S**: 1894 III Ch. 72. The court will interfere to restrain, by injunction in an action for dissolution of partnership, one partner who is committing acts which are injurious to the partnership, even though they are committed not wilfully, but by reason of his being in a state of unsound mind.

Hanfstaengl *v.* **Empire Palace. Hansfstaengl** *v.* **Newnes,** 1894, III, Ch., 109. The plaintiff was the owner of the copyright in certain pictures first produced in Germany. Those pictures have been represented on the stage in an English Theatre in the form of *Tableaux Vivants*. But such representations had been held not to be an infringment of plaintiff's copyright. The defendants published in their paper sketches of the *Tableaux Vivants* with explanatory letter press. *Held* (reversing the judgment of *Sterling J.*,) that according to English Law, the sketches in the defendant's newspaper were not copies or reproductions of the plaintiff's picture within the meaning of S. 1 of the Fine Arts Copyright Act 1862 and that the plaintiff was not entitled to an injunction.

In re **Lumley.** *Exparte* **Hood Barrs,** 1894, III, Ch., 135. Under sequestration to enforce payment of the costs, the sequestrators could not take rents which had accrued due after the date of the order for payment, even though the writ of sequestration was issued after those rents had become due.

National Dwelling Society *v.* **Sykes,** 1894, III, Ch., 159. It is the duty of the chairman to preserve order, conduct proceedings regularly and take care that the sense of the meeting is properly ascertained with regard to any question before it; but he has no power to stop or adjourn a meeting at his own will. And if he purports to do so, it is competent for the meeting to resolve to go on with the business for which it was convened, and to appoint another chairman for that object.

In re **Johnston. Mills** *v.* **Johnston,** 1794 III Ch. 204. A testator gave to the trustees, his property on trust, and directed specified sums of money to be invested for the benefit of his sons on their attaining 21, the sums to be applied as the trustees in their discretion thought fit. *Held* that the sons were absolutely entitled to the legacies freed from the exercise of any discretion on the part of trustees.

In re **Butler. LeBas** *v.* **Herbert,** 1894, III, Ch., 250. Where the general personal estate of a testator not specifically bequeathed is insufficient for payment of his debts, a specific legatee of property charged by the testator in his lifetime with the payment of a sum of money must, as between such specific legatee and other specific legatees or devisees, bear the burden of the incumbrance, and a general direction in the will that the testator's debts shall be paid after his decease is not sufficient to throw any part of such burden on the specific devisees of the real estate.

Aestan v. Aestan, 1894, III, Ch., 206. If it can be gathered from the words used, that a testator intended to give a particular property to a legatee, but owing to the testator having several properties answering to the description in the will, it is impossible to say, either from the will itself, or from extrinsic evidence, which of these several properties the testator referred to, the gift fails for uncertainty, and the court cannot, to avoid an intestacy, construe the will as giving the legatee the option of electing which property he will take.

Lambton v. Mellish. Lambton v. Cox, 1894, III Ch, 163. The acts of two or more persons may, taken together, constitute such a nuisance that the court will restrain all from doing the acts constituting the nuisance, although the annoyance occasioned by the act of one of them, if taken alone, would not amount to a nuisance.

Brinsden v. Williams, 1894, III. Ch., 185. Solicitors of a mortgagee-trustee are not liable for the insufficiency of the security.

In re **Martindale**, 1894, III, Ch., 193. An injunction, having been granted, restraining a man (A) from holding conversation with a female ward of court, further proceedings took place before the judge. A paragraph appeared in a newspaper stating that a romantic story was enacted before the judge, giving the name of the lady and further particulars. Another newspaper also published the same not knowing that the proceedings were not in open court. *Held*, that the publication in the first paper was a contempt but not a serious one, and as it was not intentional, that justice would be met by ordering the publisher to pay costs. The court *held* that the motion as to the other newspaper was vexatious and an abuse of the process of court

In re **Lord Stratheden and Campbell. Alt v. Lord Stratheden and Campbell**, 1894, III, Ch., 266. A gift by will for the benefit of a volunteer corps, is a charitable bequest. A testator bequeathed an annuity of £100 to be provided to a volunteer corps on the appointment of the next Lieutenant-Colonel. Held that the gift was void, because it infringed the rule against perpetuities.

Noyes v. Paterson, 1894 III, Ch. 267. A person who has contracted to purchase lands is not entitled to repudiate his contract simply because one link in the vendor's title, consists of a voluntary conveyance to a person under whom the vendor claims by purchase for value.

Freeman's Case 1894 III, Ch. 272. Withdrawal of an application for shares may be made orally before notice of allotment is given.

In the absence of evidence to the contrary, the Court will infer, that a Clerk in the Registered Office of a company is, during business hours, and whilst the Secretary is absent, so far in charge of the Office that he has authority to receive a notice so as to make it a communication to the Company.

MISCELLANEOUS.

We beg to acknowledge with thanks the receipt of the following legal publications :—

The Harvard Law Review for November (*in exchange*).

The Canada Law Journal for October and November (*in exchange*).

The Canadian Law Times for October and November (*in exchange*).

The Green Bag for October and November (*in exchange*).

The Western Law Times for October and November (*in exchange*).

The American Law Review for September and Oct. (*in exchange*).

The Brief for November (*in exchange*).

Handwriting of criminals.—Some investigators have detected curious peculiarities in the handwriting of criminals. Lombroso, for instance, divides 520 criminals, into two groups, the first of which includes homicides, highway robbers, and brigands.

The greater part of these make letters much lengthened out; the form is more curvilinear than in ordinary writing and at the same time more projecting; in a considerable number the cross for the "t" is heavy and prolonged, and is common also among soldiers and energetic persons. All ornament their signatures with small strokes and flourishes; some terminate their names with a short hook; assassins are apt to end each word with a sharp vertical stroke.

The second group is composed exclusively of thieves, who do not make their letters curvilinear. In their cases the characters are small, and the signature has nothing striking about it. On the whole, the writing is like that of a woman. Characteristic of the handwriting of thieves is the bending of almost all the letters.

Lombroso suggested to an irreproachable young man who had been put in the hypnotic state that he was a brigand whereupon his handwriting wholly changed; he made large letters and enormous "t' s."—*The Green Bag.*

Divorce—In a suit for separation, counsel for the plaintiff pleaded, among other reasons, incompatibility of temperament. He depicted the character of the husband as "brutal, violent and passionate." The husband's advocate rose in his turn, and described the wife as "spiteful, short-tempered, and sulky."

"Pardon me," interrupted the judge, addressing both limbs of the law. "I cannot see, gentleman, where the incompatibility of temperament comes in."

Trial by Jury—When Judge Buxton of N. C. as a young lawyer made his first appearance at the bar, the solicitor, as is customary in that state asked him to take charge of a case for him. The young lawyer did his best, and the jury found the defendant, who was charged with some petty misdemeanour, guilty. Soon after one of the jurors, coming round the bar, tapped him on the shoulder "Buxton" said he, "the jury did not think that man guilty, but we did not like to discourage a young man."—*The Green Bag.*

Tort—Selling Glandéred Horse—In *State* v. *Fox,* 29 A. R, 601, the court of appeals of Maryland has recently decided that one who sells a horse, fraudulently concealing the fact that he has the glanders, may be held liable in an action for damages for the death of a man who afterwards contracts the disease in taking care of the horse, provided it appears that it is the natural and probable consequence of contact with such a horse, and that th man was in some way acting for the purchaser and was not merely an intermeddler or volunteer. The court, after citing *Thomas* v. *Winchester,* 6 N. Y. 397, and *Heaven* v. *Pender,* 11 Q. B. D, 503, said. "Without deeming it necessary to pass upon all of them, or to go to the full extent that *Thomas* v. *Winchester* has gone, we are of the opinion that the authorities, and a proper regard for the protection of innocent persons, fully justify us in the conclusion that if a vendor sells any property which he knows to be imminently dangerous to human beings, and likely to cause injury, to an innocent vendee, who is not aware of the danger, and to whom false representations have been made as an inducement to the sale, he may, under proper allegation and proof, be held responsible, not only to the vendee, but to such person or persons as the vendee may, in the ordinary course of events call upon to take charge of the property for him." It appears to us that the court go further than *Thomas* v. *Winchester*: that was a case in which a manufacturer of medicines put up and sold belladonna in a jar labelled "dandelion," and he was held liable for injuries to the plaintiff, who bought it from a druggist to whom it had come in the course of businesss. Sir William Brett in *Heaven* v. *Pender* says of this case, it "goes a very long way," and "I doubt whether it does not go too far." But Sir Frederick Pollock, in his treatise or Torts regards it as good law, and it is followed in *Norton* v. *Servace.* 106 M. 143; 8 A, R. 298. In that case poison sold under a harmless guise was certain to do mischief. In the principal case the glandered animal was not naturally certain to do

mischief, although it was possible. Therefore it seems that the principal case goes even further than the Thomas case. But we are not inclined to dispute its soundness. It seems a not unreasonable extension of the liability of the consequences of fraudulently selling an article that may probably cause infection. If the horse had been sold for food the liability of the seller could hardly be doubted. The New York court of Appeals however, in *Loop* v. *Litchfield* 42 N. Y. 351, 1 A. R, 543, set a bound beyond which they refused to carry this doctrine. A balance wheel, with invisible defects, was sold by the manufacturer to one who bought it for his own use with oral notice of the defects. After some years' use he lent it, and it broke and killed the borrower. The manufacturer was held not liable in damages for his death *The Thomas case* was distinguished on the ground that "Poison is a dangerous subject" and the injury was the natural and probable consequence. *Heaven* v. *Pender* is cited in *Van Winkle* v. *Am. St Boiler & Co.* 52 N. J. L. 240; and *Phillips* v. *Library Co.*, 55 N. J. L. 307. *The Green Bag.*

Inheritance—Murder of Ancestor by Heir.—In *Shellenberger* v. *Ransom*, the Supreme Court of Nebraska have recently, upon a rehearing which has been pending three years, reversed their former decision, and now hold that the murder of an intestate by one of his natural heirs does not estop the murderer from taking the inheritance. The former decision was based on the celebrated case of *Riggs* v. *Palmer* 115 N. Y. 506. Since the decision of the latter case however, our Ohio circuit court have held to the contrary of the New York case, *in Dean* v. *Milliken*, 28 Ohio Law Journal, 357, and in *Queens* v. *Queens*, 100 N. C, 240, a widow accessory to the murder of her husband was still held entitled to dower. The last two cases were cited by the court in the principal case, but no reference was made to the celebrated case of *Cleaver* v. *Mutual Reserve Fund Life Association*, (1892) 1 Q. B. 147. There it was held that the executors of Mrs. Maybrick could recover an insurance on his life effected by him for the benefit of his wife, although she had murdered him; but it was put on the ground that the moneys formed part of his estate, the trust for her benefit having become void by reason of her crime, and as between the insurer and the executors the question of public policy could not arise. *Esher, M. R.* said: "That the person who commits murder or any person claiming under him or her, should be allowed to benefit by his or her criminal act, would no doubt be contrary to public policy. But if the matter can be dealt with so that such person should not be benefited," the company should not be allowed to avoid the policy for which they had received premiums for many years. *Fry L. J.* said: "It appears to me that no system of jurisprudence can with reason include amongst the rights which it

enforces rights resulting directly to the person asserting them from the crime of that person." "If no action can arise from felony or misdemeanor." *Lopes L. J.* said: I do not doubt that the principle of public policy would prevent the wife from recovering the amount of the policy money from them, and so reaping benefit from her crime." These observations are of course *obiter*, but they express the common and right sense of the matter. The Nebraska Court now repudiate the New York doctrine, because they have discovered that the latter court misapprehended the case of *Insurance Company* v. *Armstrong* 117 U. S. 599, in assuming that that the action was brought by the representative of the murderer instead of the representative of the insured. That does not help the Nebraska Court. If the right of action was denied to the representative of the innocent insured, much more would it be denied to the representative of the murderer. (The *Armstrong case* is contrary to the Maybrick case, but that is unimportant; our court simply go further than the English court on the some road.) It really seems to us that the question is too clear for debate. The opinion of the Nebraska, Ohio and North Carolina courts, that a murderer may inherit from his victim, because the statute of descent does not say that he shall not, seems almost grotesque in its blind narrowness amounting to practical immorality. One might as well contend that a highway-man who kills a traveller and takes his horse, although he must go to prison for the crime, is still entitled to the horse because the statute does not provide to the contrary. The Saviour probably did not think that the wicked men in the parable were sound in law when they said. "This is the heir, come, let us kill him, and the inheritance shall be ours." And the "Central Law Journal" is equally grotesque when it pronounces this Nebraska decision to be on "a safe and sound basis."—*The Green Bag.*

The Judicial Statistics for the Chancery Division.—A return has recently been published which deals with the Judicial Statistics for 1893. Dealing first with the Chancery Divsion, we find that the number of matters dealt with during the year was 1,301 whilst those set down or transferred during the year amounted to 2,098. The corresponding figures for 1892 were 1,157 and 1,601 respectively. The proportion of actions disposed of was considerably greater in 1893 than in 1892. Matters awaiting a hearing at the end of the year have dwindled from 660 in 1892 to 460 in 1893.

The proportion borne by the number of proceedings disposed of during the year 1892—93 to the number for disposal was 83·3 per cent. in 1891-92 it was 71·0 per cent; in 1890—91 it was 76·1 per cent; in 1889—90 it was 70·5 per cent; and in 1888—89 it was 77·0 per cent.

The number of days the judges sat in Court in the year 1892-93 was as follows: *Mr. Justice Chitty*, 176 (in addition, *Mr. Justice Chitty*, sat thirty-four days to hear chamber summonses). *Mr. Justice North*, 174 (in addition, *Mr. Justice North* sat thirty-four days to hear chamber summonses). *Mr. Justice Kekewich*, 177 (in addition, *Mr. Justice Kekewich* sat thirty-one days to hear chamber summonses). *Mr. Justice Romer*, 207; *Mr. Justice Wright*, sitting as an additional judge of the Chancery Division 82; the Vacation Judges, 11; total 1,003.

Statistics of the Probate Court.—The Court of Probate, established under the Act 20 and 21 Vic. C 77, exercises jurisdiction in all matters relating to the grant or revocation of probate of wills and letters of Administration.

Of the proceedings in this Court for the year ending October 31, 1893, a return has been furnished from which we gather that 16,710 probates were granted in 1892-93, as against 18,878 in 1891-92, the corresponding figures for administrations being 7,894 and 8,286, respectively; caveats stand at 1,355; appearances at 281; motives at 407; actions and writs at 241, and summonses at 708, Trials by special jury took place in seventeen cases, and by common jury in twelve; whilst 100 causes were heard by the judge alone.

Statistics of the Divorce and Matrimonial Causes Court.—The proceedings in the Court for divorce and matrimonial causes show that petitions for dissolution of marriage remain in number much as they were, the number being 533 for 1892-93 and 526 for 1891-92. The number of petitions in other matters is small. The causes tried before the Court itself numbered in 1892-93, 810, in 1891-92, 989; total amount of fees actually received in the year ending October 31, 1893, in respect of the Court for Divorce and Matrimonial Causes was 1,297 *l.* against 5,811 *l.* in 1892 and 6,139 *l.* in 1891. From the establishment of the Court for Divorce and Matrimonial Causes, the proceedings in which commenced on January 11, 1858, up to October 31, 1893, the number of petitions filed was 18,297.

Judicial Dispatch.—Speaking of dispatch and celerity as exhibited by Judges, the *Montreal Legal News* makes this wise remark: 'It would be matter for regret if the Bar and the Judges generally began to measure judicial proficiency by the progress of the clock'.

Judicial Committee of the Privy Council.—The return made by the Registrar of the Privy Council for 1893 shows the proceedings of the Judicial Committee of the Privy Council during the year, under the usual headings of Vice-Admiralty Courts, Ecclesiastical Courts, Channel Islands and Isle of Man, Colonies and India.

The number of appeals entered in 1893 was 88, against 72 in 1892 and 66 in 1891.

House of Lords.—The Judicial proceedings of the House of Lords during the session of 1893–94 are shown in the return furnished by the Clerk of the Parliaments.

In the following abstract the number of cases from each of the Courts named is stated for 1893, in comparison with the numbers for the two preceding years.

——	1893	1892	1891
From the Court of Appeal England ...	39	40	29
„ „ Ireland ...	2	6	5
From the Court of Session, Scotland ...	33	16	19
From the Court of Probate, England ...	...	...	...
From the Court of Divorce, England ...	...	...	...
Total presented ...	74	62	53

Abating Nuisances.—The House of Lords, by affirming, on November 27, the decision of the Court of Appeals in Lemmon *v.* Webb that an adjoining owner may cut the branches of his neighbour's trees which project over his own land without notice or complaint as to the nuisance caused, has, no doubt, laid down correct law; but the judgment will be a terrible temptation to the neighbourly person. The general rule seems also to be laid down that notice before abatement of a nuisance is not necessary. It will be interesting to see how this is applied, as between landlord and tenant, when the former is responsible for the drains.

Despatch :—The method of hearing argument by talking to counsel seems to be in vogue in England to-day, and the appellate courts seem to be on the *qui vive* for bad law and frivolous motions, ready to discourage all but cases which they think worth arguing. This, if restrained by a wary anxiety to see any real chance of doubt and then allow full argument, must go far in weeding out from the list really hopeless appeals, and so in adding to the speed and popularity of litigation. To give an instance of the new method, it is said that a plaintiff an attorney, recently appeared *pro se* moving for a new trial of a libel action on the ground of misdirection. A bill had been sent him for an account which he had paid, and it had been opened by a clerk,—that was his belief. After he had argued five minutes, Lord Esher leaned forward and this is the substance of his remarks :—" Mr.———, if

your complaint had been demurred to, the demurrer would have been sustained; if, at the trial, a motion for a nonsuit had been made, it should have been granted; failing that, the jury ought to have found against you, as they did." Then, leaning back again, he added, after a moment. "But I'm open to conviction. I'm open to conviction."

In some hands this might do injustice. Even if the plaintiff had had a case for argument, such a greeting might have diminished the force of his logic.—*Harvard Law Review.*

Lumley v *Wagner denied.*—The case of *Lumley* v. *Wagner* I. De. G. M. & G, 604, excited much comment at the time of its decision, and in the line of English Cases to which it has given rise, there is evidence of a desire not to go in any way beyond it, *Montague* v. *Flockton*, L. R, 16 Equity 189, where an actor, defendant, was in effect restrained from doing anything at all but act for the plaintiff, being overruled at the first opportunity *Whitwood Chem. Co.*, v. *Hardman*, L. R, (1891) 2 ch, 416, Such injunctions as that in *Lumley* v. *Wagner* have been granted in New York on more than one occasion, where the same desire to limit the effect of the rule has not been apparent. One is interested, therefore to find *Mr. Justice O. W. Holmes* denying the rule entirely in the recent case *Rice* v. *D'Arville* (Mass Suffolk Equity Session, September 29, 1894).

"It is agreed on all hands," he says, "that a court of equity will not attempt to compel a singer to perform a contract to sing . . . . If this is so, as is admitted, it appears to me, with all respect to judges who may have taken a different view, that there is no sufficient justification for saying to an artist that although I will not put him in prison if he refuses to keep his contract, I will prevent him from earning his living otherwise, as a more indirect means of compelling him to do the same thing. I do not quite see why, if an equitable remedy is to be given for the purpose of making an artist keep his contract, the usual remedy should not be given, and the whole of it; why, if I say, 'If you do not sing for the plaintiff you shall not sing elsewhere, I should not say, "If you do not sing for the plaintiff you shall go to prison." I think the later English Judges are quite alive to the force of these considerations, and simply bow to the authority of *Lumley* v *Wagner*, which of course does not bind me."

Mr. Justice Holmes dwells a moment on the reason for refusal to say, "you must sing," and seems inclined to put it on the score of difficulty in seeing whether "the artist in good faith and really has given the other party the benefit of the talents for which he was engaged

In addition to this may there not be a feeling against restraint of the personal liberty of the citizen? Doing personal service because one is ordered to under the pains and penalties which a court of equity can inflict, seems dangerously like temporary slavery. And might not a court well say, "This is too much to give, whether or no one can do it, even to one who asks for the letter of his bond":—*Harvard Law Review.*

Contract.—Restraint of Trade—Held, a combination of a number of brewers to enable the members who have entered into it to control the price of beer within the city, is illegal, being in restraint of trade. *Nester* v. *Continental Brewing Co.*, 29 A. R., 102 (Pa.)

This result has been reached almost invariably where an agreement has tended to raise prices, destroy competition, or create a monopoly. *Central Shade Roller Co.*, v. *Cushman* 143 Mass. 353, goes farthest of any case in supporting such a combination. It is possible to distinguish that case from the principal case, in that the restraint of trade there was not for an article of prime necessity or a staple of commerce, while in the principal case, assuming that beer is not an article of prime necessity, the court treats it as a staple of commerce. since it is an article of daily consumption.

Damages.—Railway Accident—Insanity—where a passenger on a railway is made insane by the excitement of a collision, but is uninjured bodily, the company is not liable, as such insanity is not a natural and probable result of the accident *Hailes curator* v. *Texas P. Ry. Co.*, 60 Fed. Rep. 557 (La).

As long as *Schaffer* v. *Ry.* 105 *W.* S. 249, remains good law in the united States courts, such decisions as this are necessitated by authority. It is very doubtful, however, if in either of these cases the court were warranted in assuming without reference to a jury that insanity was not a natural and probable result of a railway accident. Loss of power, whether mental or physical, would seem a legitimate item in damages; and the fact that cases of this kind do occur and are litigated in the courts would seem to imply that resultant insanity from the shock is a more or less probable result of a collision:—*Harvard Law Review.*

Torts.—Malicious Diversion of Water.—The defendant intentionally so drained a marsh on his land as to divert the water from the plaintiff's land, where it was used for irrigation. Held, that since the act was intentionally injurious to the plaintiff, it is immaterial whether a stream

or only percolating waters were diverted, the defendant being liable in either case. *Bartlett* v. *O'Connor*, 36 Pac. Rep. 513 (Cal.)

This decision is a too hasty disposal of a troublesome question, since it is appearently the first case in California on the point at issue. The court decide the defendant's act "Malicious injury" and give the case no further consideration, not citing a single case in support of the conclusion reached. Yet the weight of authority is against the proposition laid down—that a lawful act upon one's own land may become unlawful by reason of an improper motive. It is, perhaps, fair to say, however, that the tendency of the courts is to extend liability for purely malicious acts which would not be unlawful if done without the sole intent to injure :—*Harvard Law Review.*

Synopsis of the course of studies in the Harvard Law School :—Law school of Harvard University, Cambridge, Mass, nine instructors, 363 students, 44 graduates, 36 weeks in school year. Course of study : First year, contracts, 108 hours ; Criminal Law and Procedure, 72 hours ; Civil Procedure at Common Law, 36 hours. Books used : Langdell's Cases on Contracts ; Chapin's Cases on Criminal Law ; Gray's Cases on Property, Vols. 1 and 2 ; Ames's Cases on Torts ; Ames's cases on Pleading. Second year. Agency, 72 hours ; Bills of exchange and Promissory notes, 72 hours ; Law of Carriers, 72 hours ; Contracts, 72 hours ; Evidence, 72 hours, Jurisdiction and procedure in equity, 72 hours ; Property 72 hours ; Sales of personal property, 72 hours ; Trusts 72 hours, Books used : Ames's Cases on Bills and notes ; Keener's Cases on Quasi-Contracts ; Langdell's Cases in Equity Pleading ; Gray's Cases in Property, Vols. 3 and 4 ; Langdell's cases on Sales ; Ames's Cases on Trusts. Third year. Constitutional Law, 72 hours ; Corporation, 72 hours ; Jurisdiction and Procedure in Equity, 72 hours; Partnership, 72 hours ; Property, 72 hours ; Surety and mortgage, 72 hours ; Books used : Ames's Cases on Partnership, Gray's Cases on Property, Vols. 5 and 6.

Extra courses. Patent Law, 10 lectures ; Peculiarities of Massachusetts Law and practice, 2 hours a week.

Admission and methods of instruction. Applicants for admission not graduates of a college are examined in Latin (Caesar, Cicero) Blackstone's Commentaries. Every student who has been in the school, one year or more has an opportunity each year of arguing in a case before one of the professors in a moot court.—*American Law Review.*

Action for inducing breach of contract.—The Supreme Court of the United States, concurring with many English and American Courts, has lately held that the person is answerable in damages who maliciously procures another to break his contract with a third person. On elementary principles of law all who knowingly assist in the furtherance of such an act are civilly liable as principals. Under this principle the Western Union Telegraph Company rendered itself liable in damages equally with Debs to every railroad Company which was damaged by reason of its employees striking and quitting its service in obedience to an order from Debs transmitted knowingly by the Western UnionTelegraph Company.—*American Law Review.*